



Enhancing Environmental Outcomes from Audit Policy Disclosures Through Tailored Incentives for New Owners

Washington, DC Public Meeting

June 12, 2007

San Francisco, CA Public Meeting

June 20, 2007



Overarching Goals

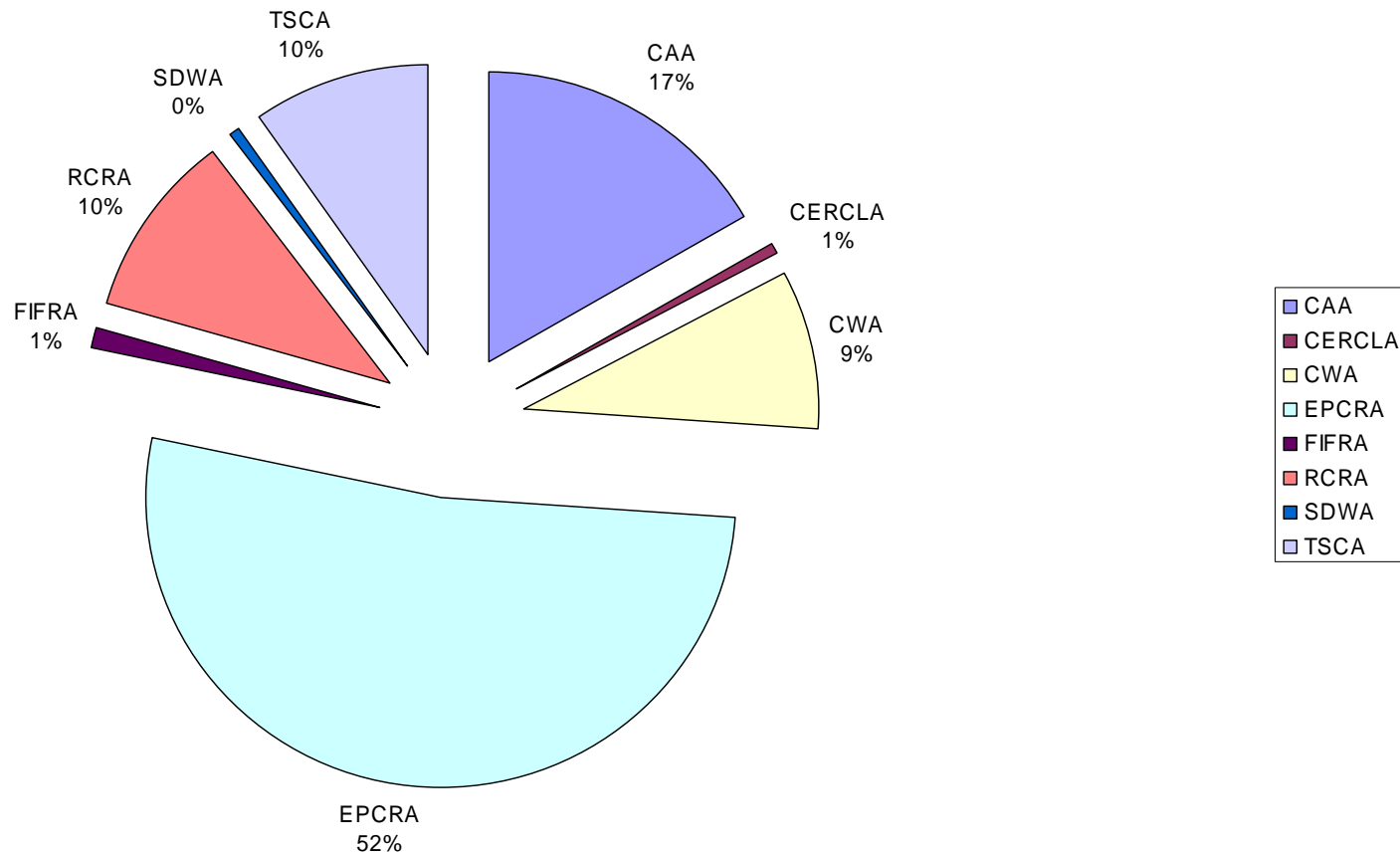
- Maximize compliance with environmental laws and regulations.
- Increase disclosures of environmental violations that, once corrected, will yield significant pollutant reductions and significant benefits for the environment and human health.



Audit Policy Results

- Audit Policy is highly successful to date – resolved disclosures of over 3,000 entities.
- However, the majority of disclosures have been of reporting violations.
- While these disclosures are important, they have not directly resulted in many pounds of pollutants being reduced or removed from the environment.

Breakout of Resolved Disclosures by Primary Law, FY 96 - 06



EPCRA over 50% because 1) Federal Program and 2) Once comply – Feds know



New Owners

- EPA is exploring the idea of offering tailored incentives to new owners to encourage them to self-audit and disclose violations at their recently acquired facilities.
- May present an opportunity to achieve significant environmental benefits more quickly than might otherwise happen.



Why New Owners?

- New owners may be well-situated and motivated to focus on, and invest in, making a clean start, by addressing environmental issues.
 - Not responsible for facility when violation arose.
 - May already be auditing and assessing new facilities.
 - Funding to fix problems may be available or budget commitments still relatively flexible.
 - Opportunity to manage and reduce risk by addressing and disclosing noncompliance.



Why New Owners? (continued)

- In recent years, EPA has entered into corporate auditing agreements with new owners after mergers or acquisitions valued at over \$1 billion, which offer promising opportunities for significant environmental outcomes.
- Active M&A Market
 - Estimated 80 M&As over \$25 million annually in Chemical Industry (source: Young & Partners).



New Owners FR Notice – Poses a Series of Questions

- Should EPA offer tailored incentives to new owners to maximize environmental outcomes, and why?
- Who is a bona-fide “new owner” and what should a pilot program require?
- What incentives should be considered?
- How to measure success of pilot?



Should EPA offer tailored incentives to new owners?

- Do the circumstances of new ownership warrant special consideration or handling -- if the new owner was not responsible for creating a violation and there exists potentially significant environmental benefit that could result from new owners' disclosures and correction of violations?
- Or does the Audit Policy as currently implemented already offer sufficient incentives?



Realities of M&A Transactions Today

- To what extent do pre-acquisition due diligence reviews reveal environmental noncompliance (as opposed to environmental contamination and remedial liability)?
- To what extent are these liabilities reflected in purchase price?



Realities of M&A Transactions Today

- If a selling firm has indemnified the purchaser for violations which are ultimately disclosed by the new owner, are tailored incentives to self-report needed at all?
- What are the potential effects on environmental compliance and on due diligence reviews that might result from offering tailored incentives for new owners?



Who is a bona-fide “new owner?”

- Need clear, straightforward, easily administered approaches to making determinations.
- EPA is concerned about using its enforcement resources to delve into complex corporate structures or histories to determine authenticity of new ownership.

Who is a bona-fide “new owner?”

(continued)

- What would a company need to provide to demonstrate “new ownership?”
- Require self-certification?
 - What should it contain? Other proof?
- How long is an owner “new?”
- How to treat different acquisition situations?
 - Mergers; Chapter 11 bankruptcies; Controlling interest with firm uninterested in managing operations; Employee-purchased.



Other Eligibility Issues for any New Owner Incentives

- Should new owners have to do a certain level of pre-acquisition due diligence? And if so, what level?
- Should EPA take into account the extent to which purchase price reflects noncompliance liabilities? And if so, how?
- Should indemnification agreements have any bearing on eligibility? And if so, how?

What incentives should be considered?

Reducing penalties for economic benefit

- When should clock start for the calculation of economic benefit?
 - Date of acquisition?
 - Date audit completed?
 - How long is reasonable to finish audit?
 - Date of the end of a reasonable period to install controls?
- Take any indemnification into account?
- Allow offsetting of cost of audit?
 - How to fairly, objectively, efficiently establish audit cost?

What incentives should be considered?

Allowing Audit Policy consideration for otherwise ineligible violations

- Certain violations are not eligible for Audit Policy penalty mitigation because their discovery is already legally required, and thus not “voluntary” as the Audit Policy requires.
- But, EPA wants to encourage new owners to examine compliance and operations at their newly-acquired facilities, correct violations and upgrade deficient equipment and practices.

What incentives should be considered?

Allowing Audit Policy consideration for otherwise ineligible violations (continued)

- EPA has made new owners eligible for the Audit Policy when they disclose violations Clean Air Act Title V violations before the first required annual certification at the new facility, or when they discover the violations as part of a compliance exam they agree to undertake before then.

What incentives should be considered?

Allowing Audit Policy consideration for otherwise ineligible violations (continued)

- Are there other similar categories of violations disclosed by new owners that should be eligible for Audit Policy consideration?
- Should new owners that, for example, undertake in good faith a Risk Management Plan triennial Audit, and then discover and disclose violations, be similarly eligible for Audit Policy consideration?

What incentives should be considered?

Providing Recognition

- Would positive recognition by the Agency, commending a new owner's willingness to voluntarily audit and disclose, encourage a company to undertake such actions?
- What sort of recognition, if any, would be most desirable?
- Any other incentives?

How to measure success of pilot?

- Number of disclosures?
- Significance of violations involved?
- Significance of pollutant reductions?
- Transparency of program?
- Efficiency of administration?
- Low transaction costs?
- Other measures?
- Measurement methodologies?



Objectives of any New Owners Pilot Program

- Increase # self-audits and disclosures that yield significant environmental benefits.
- Transparent, straightforward, clear.
 - Ensure only bona-fide new owners.
- Efficient to administer with limited resources.
- Minimal transaction costs for Agency and new owners.



New Owners – Public Process to Explore Idea of Tailored Incentives

Federal Register Notice, May 14, 2007

- 60-day comment period, ends July 13
- Docket for written comments
 - Docket ID# EPA-HQ-OECA-2007-0291 (www.regulations.gov or by hand or mail as described in Notice)
- Oral Comments
 - Public meeting in D.C., June 12
 - Public Meeting in San Francisco, June 20
- EPA will review comments and decide whether to develop pilot program to test idea
 - Proposal for pilot program would be published for comment